Mr. Nicholas St. John Green, lectured on Torts and Criminal Law in the Law School in the early seventies, will undertake the course in Admiralty. A new course, treating of The Administration of Law by Public Officers, is announced as an extra course, by Assistant Professor Wyman.

The enrollment in the school on October fifteenth was considerably greater than at the same time last year. Complete statistics will, as usual, appear in the December number.

IMPLIED PROMISE NOT TO PREVENT PERFORMANCE OF A CONTRACT. — Where under the terms of a contract performance on the one side is to be given in exchange for performance on the other, one contracting party is under no legal duty to perform where the other party has not performed or is not ready to perform, according to the terms of the agreement. This principle, formerly expressed in terms of implied conditions,[1] is accepted law in every case where the part unperformed by the plaintiff goes to the essence of the contract.[2]

When one party to a contract prevents the other from performing his part, the latter therefore has no remedy under the express contract. It is true that full performance of the plaintiff's promise may be waived by the defendant, but evidently an intention to waive performance is not shown by an act preventing the other party from furnishing a substantial part of the *quid pro quo*. The intention is rather to repudiate the contract. If a waiver is implied, the party at fault is forced to perform without receiving the *quid pro quo*, or to suffer damages if he refuses to perform which must be measured by the value of the promise which it was his legal duty to perform. To secure justice, therefore, by holding the defendant liable for the loss the plaintiff has sustained, a promise not to prevent performance is implied, the damages for breach of which are the value of the contract to the plaintiff.[3] Formerly, where prevention of performance was the cause of action, and the breach declared on was of the express promise, the plaintiff's case was dismissed.[4] In more modern times the pleading is not required to be so accurate, and thus the distinction between breach of the express and of the implied promise is not always kept in mind.[5]

In a recent Massachusetts case the failure of the court to mark the distinction just referred to resulted in the dismissal of the plaintiff's action. A fraternal beneficiary association passed a by-law limiting the amount payable upon all existing policies of life insurance to $2000 and refused to accept premiums upon a larger basis. The plaintiff, who held a $5000 policy, sued the association for breach of contract. *Porter* v. *American Legion of Honor*, 183 Mass. 326. Here the time for performance on the part of the company of its express promise, *i. e.* to pay the beneficiary $5000 at the death of the insured, has not arrived, and by Massachusetts law no action lies for repudiation of the express contract.[6] But the defendant association has refused to accept, and the plaintiff therefore has not paid assessments at the rate called for by a $5000 policy. Accordingly on the express contract

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[1] *Cf.* Kingston *v.* Preston, Lofft 194.
[2] Poussard *v.* Spiers, 1 Q. B. D. 410; Cadwell *v.* Blake, 6 Gray (Mass.) 402.
[3] United States *v.* Behan, 110 U. S. 338, 346; Weed *v.* Burt, 78 N. Y. 191; Paige *v.* Barrett, 151 Mass. 67.
[4] Shales *v.* Seignoret, 1 Ld. Raym. 440.
[5] Laird *v.* Pim, 7 M. & W. 474.
[6] Daniels *v.* Newton, 114 Mass. 530.

the plaintiff can never recover damages unless that refusal is held to be a waiver, — obviously contrary to intention and imposing on the defendant a liability greater than justice demands. There should therefore be recovery for breach of the implied promise not to prevent performance. Such is the result reached in those cases where the beneficiary is allowed to recover as damages the value of the policy less the unpaid premiums,[7] for the damages for breach of the express promise to pay the amount of the policy would be that sum and interest. This breach of the implied promise in the present case happens to be immediate, and therefore the action should be maintained.

Unfortunately the court disregarded these considerations, and on the ground that Massachusetts does not adopt the doctrine of anticipatory breach gave judgment for the defendant. It seems to follow from this case that there is now in Massachusetts no recovery for breach of the implied promise not to prevent performance. It will be interesting to observe whether the court will adhere to this rule when the question is next presented to it. A. L.

INNKEEPER'S LIABILITY TO GUESTS. — An early English case,[1] involving the question of an innkeeper's liability for the loss of his guests' goods, has, through different interpretations of its language, caused a striking diversity of decision. In England after some uncertainty it was laid down that an innkeeper is only *prima facie* liable. This might be rebutted by showing that the loss occurred without his own fault or that of his servants.[2] This is now law in a number of jurisdictions in the United States.[3] The view was, however, finally overruled in England.[4] It is now the English law that, unless the loss was caused by the act of God, the public enemy, or by the fault of the guest, an innkeeper is liable as an insurer. This view is adopted by a slight preponderance of authority in the United States.[5]

An insurer's liability should obviously not be imposed upon any one in charge of the property of another without strong reason. The rule in the case of innkeepers was originally established on grounds of public policy. At that time the country was infested with robbers. Easy opportunities and the transient character of their guests offered strong temptation to innkeepers to collude with criminals in depriving them of their property. This strict rule was therefore dictated by necessity. It is argued in some of the cases that the reason for the rule no longer exists. But, although our country is no longer infested with robbers, yet innkeepers may still collude with others for fraud and theft. This is especially probable in the cheaper hotels of the cities. Guests are comparatively helpless and must rely greatly upon the honesty of the innkeepers. The courts would, therefore, seem to be justified in applying the insurer's liability rule in the case of the disappearance of a guest's property.

The reason of the rule does not apply, however, where the goods are

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[7] Guetzkow *v.* Mich. Mut. Life Ins. Co., 105 Wis. 448; Natl. Mut. Ins. Co. *v.* Home Benefit Society, 181 Pa. St. 443.

[1] Calye's Case, 8 Co. 32.
[2] Dawson *v.* Chamney, 5 Q. B. 164.
[3] Metcalf *v.* Hess, 14 Ill. 129.
[4] Morgan *v.* Ravey, 6 H. & N. 265.
[5] Sibley *v.* Aldrich, 33 N. H. 553.